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No. 07-581

IN THE
# Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

*Petitioners*,

*v.*

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?

## LIST OF PARTIES

Pursuant to Rule 24.1(b), the names of the parties appearing before the U.S. Court of Appeals for the Second Circuit appear in the caption. Pennsylvania Building Company LLC, listed as an appellee below, was the predecessor of 14 Penn Plaza LLC.

The Rule 29.6 Statement in the Petition remains accurate.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 498 F.3d 88 (2d Cir. 2007). Pet. App. 1a. The Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, reported at 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. June 1, 2006). Pet. App. 13a. The District Court referred to its prior decision in *Granados v. Harvard Maintenance, Inc.*, which is reported at 2006 U.S. Dist. LEXIS 6918 (S.D.N.Y. Feb. 22, 2006), to explain its reasoning. Pet. App. 23a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2-4. Section 2 provides:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit

> to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

FAA §§ 3 and 4 are reprinted at Pet. App. 49a-51a. Plaintiffs filed this action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, reproduced at Pet. App. 52a-66a. The case also involves the National Labor Relations Act, 29 U.S.C. § 159(a), which provides in pertinent part:

> § 9(a) Exclusive representatives; employees' adjustment of grievances directly with employer.
>
> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

## STATEMENT OF THE CASE

The Federal Arbitration Act provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable,

save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Here, without citing any such grounds, and despite a "written provision" in a collective bargaining "contract" calling for the arbitration of their age discrimination claims, three employees filed such claims in federal court, and opposed defendants' suggestion of arbitration and subsequent motion to compel arbitration of their claims in the arbitral forum called for by that collective bargaining contract. The district court denied the motion to compel, and the Second Circuit affirmed on the ground that no union-negotiated agreement to arbitrate statutory employment discrimination claims is ever enforceable, no matter how clear and explicit its terms. The Second Circuit's decision draws a distinction between agreements to arbitrate such claims made by individual employees, which the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held are enforceable, and comparable agreements made by unions on behalf of their members, notwithstanding the lack of any statutory basis whatsoever for that distinction.

The applicable collective bargaining agreement expressly prohibits discrimination on the basis of any factors prohibited by federal, state, and local anti-discrimination law; provides that "all such claims" alleging discrimination are subject to the contractual grievance and arbitration procedure "as the sole and exclusive remedy;" and directs arbitrators to "apply appropriate law in rendering decisions based upon claims of discrimination." Pet. App. 48a. That agreement, made by the Respondents' duly authorized collective bargaining agent, and voted upon and ratified by the

union membership, should have been enforced just as if Respondents had signed it themselves.

1. For more than seventy years, Local 32BJ of the Service Employees International Union ("Local 32BJ" or the "Union") has served as the exclusive bargaining representative of employees within the building services industry in New York City, including building cleaners, porters, and doorpersons. In that capacity, the Union has exclusive authority to bargain on behalf of its members over their rates of pay, wages, hours of employment, and other "conditions of employment." 29 U.S.C. § 159(a). Since the 1930s, the Union has engaged in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (the "RAB"), the New York City real estate industry's multi-employer bargaining association, to set the terms and conditions of its members' employment.

The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreements for Contractors and Building Owners (the "CBA"). The CBA, voted upon and ratified by the union membership, covers a variety of terms and conditions of employment, including wages, hours, benefits, grievance procedure, strikes, stoppages, and lockouts. It expressly prohibits discrimination in employment — an important goal for labor, management, and employees in the "melting pot" of the New York City labor market. Pet. App. 48a. It also broadly provides for arbitration to decide all differences between the parties over the "interpretation, application or performance" of the agreement, including claims arising out of the employment relationship between the employer and the employees. Pet. App. 43a.

Articles V and VI of the CBA provide for a number of specified "Contract Arbitrators," who work under the aegis of the Office of Contract Arbitrator ("OCA"), to decide all differences arising between the parties that are not resolved directly by the Union and employer through a two-step grievance procedure. Pet. App. 43a-47a. The costs of arbitration are generally shared by the Union and the RAB. *Id.* Arbitrators are required to issue a written award within thirty days after the close of the hearing, are required to apply "appropriate law" as regards discrimination claims, and are empowered to "grant any remedy required to correct a violation . . . including, but not limited to, damages and mandatory orders." Pet. App. 45a, 48a.

2. Beginning in 1999, the Union and the RAB agreed to a provision in the CBA that expressly requires employees to submit any claims of employment discrimination, including claims of age discrimination arising under federal, state, and city law, to binding arbitration under the CBA's grievance and dispute resolution procedures. According to that provision:

> § 30. NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any

> other similar laws, rules or regulations. *All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations.* Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Pet. App. 48a (emphasis added.) The bargaining parties specifically crafted this language to meet the requirement, set forth in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998), that any waiver of rights to adjudicate statutory claims be "clear and unmistakable." It is undisputed that the waiver set forth in the CBA is clear and unmistakable. Pet. App. 6a, 21a, 48a.

This arbitration clause pertaining to discrimination claims was heavily negotiated by Local 32BJ and the RAB. With the bargaining leverage that comes from representing approximately 80,000 employees in the industry, the Union gained sizable wage and benefit enhancements, as well as other favorable provisions, in exchange for its agreement to arbitrate its members' statutory employment claims. Without this arbitration provision, many of the Union-represented building service workers would as a practical matter need to become *pro se* plaintiffs to remedy any perceived discrimination, a daunting task for any individual, but especially for the large percentage of immigrant building service workers for whom English is a second language. Similarly, those employees fortunate enough to obtain an attorney would be required to pay fees and perhaps a percentage of any recovery. By contrast, under the

arbitration provision in the CBA, these same employees are provided an attorney by the Union at no cost to them, and do not pay administrative fees (*i.e.*, arbitrator or forum fees), which are generally apportioned between the RAB and the Union.[1]

In addition, arbitration of discrimination claims minimizes duplicative efforts and resolves disputes quickly, less expensively, fairly, and effectively. Many discrimination claims arise out of the same facts and circumstances as contractual grievances alleging violations of the CBA. For example, an employee who asserts that he was discharged without just cause may also claim that his discharge was the result of age discrimination. Consolidating the legal process allows one factfinder (generally an employment attorney serving as arbitrator) to consider the facts and circumstances that encompass both claims, and make determinations on the related claims. The ability to consolidate the actions results in economies of scale for all parties involved, and ensures consistent rulings on the related issues, while providing employees and employers with the full scope of remedies and defenses available under the anti-discrimination laws.[2]

[1] While the Union provides an attorney without charge, employees may also retain private counsel at their own expense, as was the case here.

[2] The arbitrators under the CBA include members of the labor and employment bar, specifically designated by the parties, who are knowledgeable concerning employment discrimination jurisprudence generally and have specific expertise in claims arising in the real estate industry. *See* Pet. App. 47a, Joint Appendix ("JA") 68-69.

3. Respondents, who are all members of Local 32BJ, are employees and a now-retired employee of Temco Service Industries, Inc. ("Temco"), a building service and cleaning contractor. Prior to August 2003, they worked as night watchmen/porters in 14 Penn Plaza LLC's commercial office building located at 225 West 34th Street in New York City. They are all covered under the CBA.

In or about August 2003, in an effort to improve building security in response to post–9/11 security concerns, 14 Penn Plaza engaged Spartan Security, a unionized security services contractor, to provide trained, licensed security guards to staff the front lobby desk and the rear entrance of the building. As a result, Temco's services were no longer needed in these locations. In compliance with the CBA, Temco reassigned Respondents to equivalent duties in other locations in the building. Pet. App. 4a; JA 72-73.

4. Respondents were dissatisfied with these changes, and Local 32BJ filed a grievance about the reassignments under the CBA's dispute resolution procedures, raising contractual and age discrimination claims. JA 8, 31-33, 83, 89, 95-96; Pet. App. 4a. Prior to the arbitration hearing, the Union withdrew the portion of the grievance alleging age discrimination and Respondents declined repeated requests by the employer that they arbitrate those claims. JA 45-46, 76, Pet. App. 17a.[3] At the arbitration hearings before

[3] On February 18, 2005, while the arbitration was pending, counsel for Respondents again advised Petitioners' counsel by fax that Respondents declined to arbitrate their age (Cont'd)

Arbitrator Earl Pfeffer,[4] Respondents were accompanied by their private attorney in addition to Union-provided counsel. JA 49.

While the arbitration was pending, Respondents filed age discrimination charges with the EEOC and also a "hybrid" Section 301/Duty of Fair Representation (DFR) lawsuit against 14 Penn Plaza, Temco, and the Union, alleging in part that the Union breached its duty of fair representation by withdrawing their age discrimination claims from the arbitration. JA 8-9, 22. The EEOC concluded that the evidence presented failed to indicate that an ADEA violation had occurred, and issued a right-to-sue letter. Despite the agreement in Section 30 of the CBA that "all such claims" would be subject solely and exclusively to arbitration, on September 23, 2004, Respondents filed this lawsuit in federal court alleging that their reassignment violated federal, state, and city laws prohibiting age discrimination. JA 1, 10-13.

On August 10, 2005, Arbitrator Pfeffer issued a 19-page opinion denying all of Respondents' contractual claims. JA 49-67. Respondents shortly thereafter withdrew their Section 301/DFR lawsuit with prejudice. JA 70.

(Cont'd)

discrimination claims, as they had been repeatedly asked to do. While not contained in the Record, Respondents' then-counsel of record agreed that Petitioners could cite this fax, and it has been lodged with the Clerk.

[4] Mr. Pfeffer is an experienced employment lawyer, formerly a partner at a union-side law firm, who works full time as a grievance arbitrator in private and public sector cases in unionized industries. JA 68-69.

On November 23, 2005, the employer[5] moved to compel Respondents to arbitrate their claims pursuant to Sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3-4, based on the clear agreement in the CBA that "all such claims" would be subject to arbitration "as the sole and exclusive remedy for violations." JA 40-46, Pet. App. 48a.[6] It was undisputed that the employer had repeatedly asked the employees to arbitrate their age discrimination claims while the arbitration was proceeding (*e.g.*, JA 76), and that an arbitral forum was still available for resolving the employees' claims.[7] The employees opposed the motion to compel on the ground that they were not bound as a matter of law by the CBA's promise that their discrimination claims would be resolved exclusively by arbitration. JA 74-78.

The district court denied the motion to compel arbitration based on "binding Second Circuit precedent that even a clear and unmistakable union-negotiated

[5] For convenience, Petitioners herein – defendants in the district court – are referred to as the "employer."

[6] The employer moved, alternatively, to dismiss for failure to state a claim.

[7] In support of the employers' motion for an order "directing Plaintiffs to arbitrate their age claims pursuant to the Federal Arbitration Act" (JA 42), the Union provided an affidavit consenting to the use of the Office of Contract Arbitrator "created under the Collective Bargaining Agreement . . . as the forum for Plaintiffs' private attorney to pursue Plaintiffs' statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration." Pet. App. 42a.

waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." Pet App. 21a.

5. On appeal, acknowledging that this Court's precedents left the central question unresolved, the panel affirmed, considering itself bound by the Second Circuit's earlier decision in *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir.) (*per curiam*), *cert. denied*, 531 U.S. 1036 (2000), that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), rendered collectively bargained agreements to arbitrate statutory discrimination claims categorically unenforceable. Pet. App. 1a. According to the Second Circuit, "*Gardner-Denver* held that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress . . . ." Pet. App. 6a n.3.

Regardless of the clarity and explicitness of a collectively bargained agreement providing that all statutory discrimination claims would be subject solely and exclusively to arbitration, the Second Circuit held such promises are unenforceable under the FAA, because it perceived *Gardner-Denver* to have prohibited such enforcement. Pet. App. 8a-9a. The Court of Appeals gave no further reasons for its holding, except for its concern that the interests of the Union and the plaintiffs could be in conflict. Pet. App. 11a n.5. It failed to explain why, since the Respondents were free to arbitrate without the Union, such a conflict mattered at all or was a reason not to enforce the clear promise, binding on Respondents under the CBA, that all statutory discrimination claims would be subject "solely and exclusively" to arbitration. Pet. App. 48a.

Proceedings in the trial court have remained stayed pending appellate review.

## SUMMARY OF ARGUMENT

Congress expressly provided in the FAA that contractual promises to arbitrate "shall be valid, irrevocable, and enforceable," except where grounds exist for the revocation of any contract. The FAA applies broadly to agreements to arbitrate all types of legal claims, including claims arising under federal and state statutes, *see, e.g., Rodriguez de Ouijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), so long as the agreement to do so is clear and unmistakable, *see Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998). The FAA embodies a national policy favoring arbitration, especially in the employment context where avoidance of costly litigation is an important benefit. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

Despite these principles, the Second Circuit refused to enforce the express agreement which had been reached between Local 32BJ and the Petitioners, embodied in their collective bargaining agreement, to arbitrate statutory age discrimination claims. The appeals court did not question, and there is no dispute, that this arbitration provision met the "clear and unmistakable" standard set out in *Wright*. There is no dispute that the Union, as Respondents' exclusive bargaining representative, was authorized and entitled to bargain over all terms and conditions of their employment. And there is no dispute that in this case,

Respondents were given an unimpeded opportunity to arbitrate their claims, which they refused in favor of filing this federal lawsuit, contrary to the requirement contained in the CBA. The Second Circuit's judicial voiding of the arbitration provision flouts repeated decisions from this Court that agreements to arbitrate statutory claims are enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.*, 473 U.S. at 628.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court already examined the text, legislative history, and purposes of the ADEA, and concluded that Congress did not intend to preclude arbitration of age discrimination claims. Since arbitration waives no substantive rights afforded by statute, but "only submits to their resolution in an arbitral, rather than a judicial, forum," *id.* at 26, *Gilmer* found that arbitration is entirely consistent with the statutory goals of the ADEA. Indeed, arbitration boasts numerous advantages over adjudication that this Court has recognized including "streamlined proceedings and expeditious results," *Preston v. Ferrer,* 128 S. Ct. 972, 986 (2008), and savings of litigation time and expense, *Circuit City*, 532 U.S. at 123. Most important, arbitration allows for full vindication of statutory rights. The arbitrator in this case was authorized to apply governing law and to grant any remedy otherwise available to Respondents to remedy any violations of the ADEA or other statutes which had occurred in connection with their employment.

Nothing in this analysis changes because this agreement to arbitrate arose out of the collective bargaining process. It is a fundamental premise of labor law that a union has the power to negotiate agreements with the employer as to virtually every aspect of its members' employment – from wages and hours to methods of dispute resolution – and that those agreements are binding on the employees as if they negotiated them themselves. 29 U.S.C. § 159(a). That an employee has a statutory discrimination theory as well as a contract theory for seeking recovery does not alter the union's bargaining authority. It is appropriate for a union to bargain collectively over the method of resolving such claims in exchange for valuable concessions, as occurred here. The Second Circuit's categorical ban not only cuts against the national policy favoring informal resolution of workplace disputes, but also undermines the role of the union in negotiating on behalf of its members.

In any event, there is no evidence that Congress ever distinguished between promises to arbitrate statutory discrimination claims based on whether the promises were individually made or collectively bargained. The Second Circuit's distinction creates perverse results. Arbitral arrangements are much more likely to be advantageous to employees when they are collectively bargained. If unions cannot make such promises, then under established labor law such a term of employment would become a non-mandatory subject of bargaining, imposable by the employer on employees, simply bypassing the union. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999). Congress has not said, and could not have

intended, that courts would compel arbitration as to individual employees, as in *Gilmer*, but not when the arbitral promise was bargained for collectively.

In the face of these decisions, the Second Circuit's reliance on *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), cannot be sustained. Contrary to the Second Circuit's view, *Gardner-Denver* decided nothing about whether clear collectively bargained promises to arbitrate statutory discrimination claims are categorically unenforceable. *Gardner-Denver* held only that an arbitrator's resolution of a contractual claim is not preclusive of a statutory claim under Title VII where the parties had not expressly agreed to arbitrate the statutory claim, and the arbitrator had no power to decide it. It did not address whether Congress had intended to preclude employers from invoking the FAA to compel arbitration where, as here, the employees' union had clearly agreed on behalf of its members that all their statutory discrimination claims would be arbitrated, with the arbitrators applying appropriate law and remedies. For that reason, *Gardner-Denver* is simply not on point.

The remaining grounds sometimes argued for distinguishing *Gilmer* when collectively bargained promises to arbitrate are concerned are equally unpersuasive. Collective bargaining agreements may waive individual rights if they expressly so provide. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706-07 (1983). Speculative risks that statutory goals may be disserved (*e.g.*, the risk that a union might subordinate the employee's interest in his or her own claim to the union's interests) are insufficient as a matter of law to

defeat a motion to compel under the FAA. *See Green Tree Financial Corp. – Alabama v. Randolph,* 531 U.S. 79, 90-92 (2000). Moreover, they are unavailing here as a matter of fact, because Respondents' Union agreed that an arbitral forum was available to them. Structural protections, including suits for breach of the duty of fair representation, provide more than adequate assurance that enforcement of collectively bargained promises to arbitrate statutory discrimination claims will vindicate, and not betray, the substantive protection that Congress guaranteed.

## ARGUMENT

### I. A COLLECTIVELY-BARGAINED AGREEMENT TO ARBITRATE AN EMPLOYEE'S ADEA CLAIM IS ENFORCEABLE UNDER THE FAA.

#### A. Under the FAA, Agreements to Arbitrate Employment-Related Statutory Claims Are Enforceable.

Congress enacted the FAA more than eighty years ago "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 n.14 (1985). The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *see also Hall St. Assocs. LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1401-02 (2008) (same). Under the FAA, a contract to arbitrate any controversy arising out of a transaction involving commerce is "valid,

irrevocable, and enforceable," except where grounds exist for the revocation of any contract. 9 U.S.C. § 2.

This Court has read the FAA to require "judicial enforcement of a wide range of written arbitration agreements," interpreting it "as implementing Congress' intent 'to exercise [its] commerce power to the full.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)). *See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (reading these provisions to manifest "a liberal federal policy favoring arbitration agreements"). In particular, the FAA applies to employment contracts that contain arbitration provisions. *Circuit City Stores*, 532 U.S. at 109.

It has long been settled law under the FAA that arbitration agreements are enforceable as to statutory claims. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (enforcing agreement to arbitrate claims under the Truth in Lending Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act). This Court has rejected the notion that enforcing arbitration agreements to resolve statutory claims would somehow weaken the protections of substantive law.

The Court has identified only two circumstances in which agreements to arbitrate statutory claims are not enforceable under the FAA. First, such agreements are enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26. Second, arbitral promises are unenforceable if plaintiff can show that it will not be possible to "effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637). The party opposing arbitration has the burden, and "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Green Tree Fin.*, 531 U.S. at 91-92 (citations omitted); *Gilmer*, 520 U.S. at 26.

The logic behind these decisions is that an agreement to arbitrate waives no substantive rights afforded by the statute but "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); *Preston*, 128 S. Ct. at 987 (same). Whatever protections a particular statute grants, the FAA establishes the presumption — unless shown to be otherwise — that Congress expected arbitration to provide an equally effective way to vindicate those interests. The fact that "statutorily protected classes" are involved "provides no reason to color the lens through which the arbitration clause is read." *Mitsubishi*, 473 U.S. at 628.

Applying these rules in *Gilmer,* this Court affirmed a judgment compelling arbitration of an employment discrimination claim under the ADEA. The case involved an employee who had signed a U-4 securities agreement — a mandatory unnegotiated condition of his securities industry employment, required by his employer and the New York Stock Exchange — providing for arbitration of any claim arising out of his employment. The Court held that the arbitration agreement would be enforceable unless Congress specifically intended to preclude use of an arbitral forum for ADEA claims. The Court noted that "[i]f such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Gilmer*, 500 U.S. at 26.

The *Gilmer* Court found nothing to indicate any such congressional intention, and concluded that the plaintiff had therefore not carried his burden. To begin with, neither the text of the ADEA nor its legislative history revealed any congressional opposition to arbitration. Nor did *Gilmer* find any "inherent conflict" between arbitration and the ADEA's underlying purposes. Arbitration does not undermine the role of the EEOC in enforcing the ADEA. *Id.* at 28. Arbitration also does not deprive claimants of a judicial forum explicitly guaranteed by statute, because the ADEA does not mandate the use of any particular forum or even express a preference for judicial over arbitral forums. *Id.* at 29.

The Court also denied a variety of challenges to the adequacy of arbitration procedures:

> [I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants . . . ."

*Gilmer*, 520 U.S. at 30 (citation omitted) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

*Gilmer* rejected contentions that arbitration panels are generally biased, or that their discovery procedures are necessarily inadequate, or that arbitral decisions would somehow insulate discriminatory conduct from public knowledge or judicial review. Such arguments were held to be "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 500 U.S. at 30. Indeed, the Court emphasized, "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 34.[8]

[8] Following *Gilmer*, Congress endorsed the use of arbitration for discrimination claims, including under the ADEA. *See* Civil Rights Act of 1991, § 118.

Any doubt that the FAA should be enforced according to its terms was eliminated by *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), a case involving a motion to compel arbitration of state law discrimination claims. *Circuit City* reaffirmed that the FAA embodies a strong presumption in favor of arbitration of employment disputes except for those transportation employees excluded by the FAA, Section 1. The Court rejected the argument that the enforcement of arbitration agreements in the employment context "ignores the interest of the unrepresented employee[s]" and the "potential disparity in bargaining power between individual employees and large employers." 532 U.S. at 132-33. It reaffirmed the principle that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Id.* at 123.

### B. Local 32BJ, as Respondents' Exclusive Bargaining Representative, Had the Authority to Agree on Their Behalf to Arbitration of Their ADEA Claims.

The agreement to arbitrate statutory discrimination claims contained in the CBA was negotiated and entered into by Respondents' exclusive bargaining representative, Local 32BJ, in exchange for valuable concessions from the employers in the context of collective bargaining. The Agreement was voted upon and ratified by Local 32BJ's members. Therefore, under well-established principles of labor law, it is binding on Respondents as if they had signed it themselves.

Local 32BJ is Respondents' exclusive representative for purposes of collective bargaining. Under Section 9(a) of the National Labor Relations Act, the Union's status means that it is the sole and exclusive bargaining agent for all employees in the unit, and the scope of its authority encompasses all matters relating to the terms and conditions of employment. 29 U.S.C. § 159(a); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988). Within that broad ambit, the Union can enter into agreements that are binding not only on itself and the employer, but also on all the employees in the unit it represents. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (individual employee bound by grievance procedure agreed to by union in collective bargaining agreement).

The method of resolving disputes between an employee and the employer is a core example of a "term or condition of employment" concerning which the union's agreement is binding on the union member. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) ("[A]rrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining"). The process for resolving statutory discrimination claims is part and parcel of workplace dispute resolution, and an appropriate subject for bargaining by the union. Unions already have the power to negotiate an employee's wages, *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); waive the right to strike or engage in other concerted activity, *Mastro Plastics Corp. v. NLRB*, 350

U.S. 270 (1956) and *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); and settle workplace disputes with the employer, *Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967). These substantive rights are no less important than an employee's ability to submit a claim to a judicial forum. As some lower courts have held, the method of dispute resolution is a "preeminent" term and condition of employment as to which unions are entitled to bargain. *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 217 (4th Cir. 2007) (Wilkinson, J.) (holding that if courts placed the resolution of civil rights claims beyond the reach of arbitration, it would "change the nature of collective bargaining over conditions of employment and . . . read judicial exceptions into the National Labor Relations Act").

This Court has already held that unions may waive individual statutory rights of their members — notably including statutory protections against discrimination. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the court considered whether a union could waive its members' rights to be free of discrimination on the basis of union membership, a right guaranteed under the National Labor Relations Act, 29 U.S.C. § 158(a)(3), in connection with union officials who were disciplined more severely than other union members because of a strike. The Court answered in the affirmative that such waivers were enforceable as long as they were "clear and unmistakable," 460 U.S. at 708 — the same standard the Court would later draw on and apply in *Wright* to determine whether union-negotiated agreements to arbitrate are clear enough to encompass statutory claims. 525 U.S. at 80. *Metropolitan Edison* specifically recognized that "a union could choose to bargain away

this statutory protection [to be free of discrimination based on union membership] to secure gains it considers of more value to its members." 460 U.S. at 707.[9]

This case is easier than *Metropolitan Edison.* The Union's promise to arbitrate is a waiver not of a substantive right to be free from discrimination but only of a judicial forum for discrimination claims. Thus, the Union here was able to secure advantages in bargaining *without* its members giving up any "statutory protection" from discrimination. The one procedural right that the Union members bargained away has already been held not to affect their ability to secure relief, and for that very reason was held to be waivable. *Gilmer,* 500 U.S. at 28. Indeed, lower courts have gone even further, holding for example that collective bargaining agreements may waive individually held Constitutional rights. *See, e.g., Bolden v. Southeastern Pa. Transp. Auth.,* 953 F.2d 807 (3d Cir. 1991) (en banc) (Alito, J.) (public sector collective bargaining agreement can provide sufficient consent for searches of individual employees), *cert. denied,* 504 U.S. 943 (1992).

Judicial enforcement of collectively bargained promises to arbitrate claims arising from workplace disputes plays a central role in maintaining labor peace and resolving such disagreements. *See Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448, 451

[9] In a footnote, *Metropolitan Edison* distinguished *Gardner-Denver* on the ground that in the latter case arbitration was found to be inconsistent with the purposes of Title VII. 460 U.S. at 706 n. 11. As discussed below, *Gilmer* expressly rejected that position.

(1957) (holding arbitration agreements enforceable under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185). The pro-arbitration policy discerned and enforced in *Lincoln Mills* was further articulated in the *Steelworkers Trilogy,*[10] and has been reaffirmed in numerous cases, including *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986) (holding dispute under collective bargaining agreement presumed arbitrable); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (finding narrow scope of judicial review of arbitration decisions); and *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 407 (1976) (holding that the "driving force" behind the rule permitting injunctions when a strike concerns an arbitrable dispute "was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties"). Arbitration of disputes under collective bargaining agreements is "part and parcel of the collective

[10] *See United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (role of courts limited to determining arbitrability); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (because of the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . [d]oubts [regarding arbitrability] should be resolved in favor of coverage"); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.* 363 U.S. 593, 597-99 (1960) (arbitrator's award drawing its essence from the collective bargaining agreement must be enforced, even if the court would differ on merits).

bargaining process itself." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.[11]

For all these reasons, it was not only permissible, but entirely appropriate for Local 32BJ to agree in collective bargaining to consent to an exclusive arbitral forum for its members' employment discrimination claims. Arbitration of such disputes is consistent with and promotes the national policy favoring arbitration in the employment setting. Accordingly, the Union's agreement was binding on its members, including Respondents.

### C. Far from Indicating Hostility to the Arbitration of ADEA Claims, Congress Has Recognized Distinct Advantages to the Arbitration Process.

Under this Court's FAA jurisprudence, the CBA's waiver of a judicial forum is presumptively enforceable unless Congress has indicated an intention to preclude arbitration. *McMahon*, 482 U.S. 227. As *Gilmer* held, Congress indicated no such intention under the ADEA. Furthermore, there is nothing in the ADEA's text or legislative history demonstrating that Congress

[11] Although these cases arose under Section 301 of the LMRA rather than the FAA, this Court has looked to both statutes interchangeably in describing the broad federal policy favoring arbitration. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) ("the federal courts have often looked to the [FAA] for guidance in labor arbitration cases"); *Mitsubishi, supra*, 473 U.S. at 626 (citing *Steelworkers* decisions under LMRA in explaining the "federal substantive law of arbitrability" in FAA context).

distinguished between promises to arbitrate ADEA claims depending on whether individual employees agreed to them or they were agreed to in collective bargaining. Nor did Congress conclude – or is there any reason to find – that enforcing collectively bargained promises to arbitrate ADEA claims would result in ineffective vindication of ADEA rights as compared to judicial adjudication.

To the contrary, in the FAA and Section 301, Congress sought to foster arbitration out of the recognition that the arbitral forum offers "real benefits" without abridging or diluting substantive rights. *Circuit City Inc.*, 532 U.S. at 122. At least three benefits are notable here.

First, arbitration secures the benefits of statutory rights with "streamlined proceedings and expeditious results." *Preston*, 128 S. Ct. at 986.[12] With respect to claims regarding workplace discrimination, this is as true (if not more true) in the unionized sector as in the non-union sector, because arbitration has been the preferred dispute resolution mechanism for many decades for unionized employees, and the parties to collective bargaining agreements and their professional, experienced arbitrators are well-accustomed to resolving disputes in the arbitral forum.

[12] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes In The Debate Over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559 (2001) (explaining that "[t]here seems little dispute that because arbitration proceedings tend to be informal (and quicker), they require less lawyer time and resources").

Arbitration is well-recognized as a quicker, less expensive and more efficient method of dispute resolution when compared with litigation — "a benefit that may be of particular importance in employment litigation . . . ." *Circuit City Inc.*, 532 U.S. at 123. Many employment discrimination claims never make it to court, much less to trial,[13] and if they do get to court there is no reason to think that claimants will be better off than in arbitration.[14] By contrast, arbitration provides employees who believe that they have been discriminated against with an opportunity to present their case to a neutral fact-finder and receive a more immediate decision and remedy, if appropriate — including reinstatement, a remedy more likely to be ordered before the employment relationship has been irreversibly destroyed. Arbitrations regarding the propriety of an employee's discharge are conducted promptly by these parties, so that aggrieved employees will not have to wait years for a lawsuit to be completed

[13] *See, e.g.*, Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. Conflict Mgmt., Section Litig. 1, 8-10 (2003), *available at* http://www.arb-forum.com/ rcontrol/ documents/Research StudiesandStatistics/2003Delikat Kleiner Conflict Management.pdf (only 3.8% of the employment discrimination claims filed in the Southern District of New York reach trial).

[14] *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005) (concluding from empirical research that arbitration is significantly faster and that there is no evidence that plaintiffs fare better in litigation).

— potentially without any source of income during that period — and to be afforded an appropriate remedy if their discrimination claims are meritorious.[15]

Second, pursuing claims in arbitration may be considerably less expensive for employees. The laws against discrimination do not entitle employees to appointed counsel in federal civil rights actions. Employees in the unionized sector may have the services of union counsel who will handle members' employment discrimination claims through the collective bargaining agreement's grievance/ arbitration process.

Local 32BJ members, who hold such positions as building cleaners, porters, and doorpersons, derive a substantial benefit from their union's negotiation of an arbitration clause in which union counsel may be available to try discrimination claims of bargaining unit members in an arbitral forum. To the extent that Local 32BJ's members cannot afford an attorney, the arbitration benefit provided by the Union will enable the assertion of employment discrimination claims that otherwise might not be brought.

Third, the conflict reduction goals underlying labor law are well-served by requiring enforcement of, rather than the creation of an exception to, the FAA. Because statutory claims are likely to be intertwined with contract claims derived from the collective bargaining

[15] Under the collectively-bargained Building Service 32BJ Health Fund, a discharged employee is generally entitled to continue his or her medical benefits without cost for six months after the discharge if such discharge is pending arbitration.

agreement, requiring that all such claims be presented for resolution in one forum is efficient and consistent with the dispute resolution goals underlying the national labor laws.[16] Since *Gilmer,* arbitrators have developed extensive experience in resolving claims of discrimination under the discrimination statutes. Arbitration of discrimination claims is also likely to have the useful effect of reducing the size of a federal docket heavy with employment cases.[17]

### D. There Is No Legitimate Basis to Differentiate the Enforceability of Agreements to Arbitrate Statutory Discrimination Claims Based on Whether Consent Was Given Individually or Collectively.

Nothing in the text of either the FAA or the NLRA, or for that matter in the ADEA, justifies distinguishing the enforceability of explicit promises to arbitrate statutory anti-discrimination claims based on whether they were agreed to individually or collectively. The long and successful history of arbitration under collective bargaining agreements makes it highly unlikely that Congress – having required courts to enforce

[16] Arbitrator Pfeffer considered the same factual predicate in his CBA-based decision as was alleged or would have been testified to in support of Respondents' federal age discrimination lawsuit. *Compare* JA 3-9 *with* JA 49-53, 61-62.

[17] Over the past five years, employment discrimination cases have ranged from 5.2% to 8.1% of district court dockets. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2007 Annual Report Of The Director, James C. Duff, Table C-2A, 148 (2007).

contractual promises to arbitrate discrimination claims when those promises are made in individual employee-employer agreements – forbade them from enforcing identical promises when secured by unions in collective bargaining agreements in exchange for other valuable consideration.

In any event, under the inquiry *Gilmer* requires, there is simply no legislative direction instructing courts to carve out from FAA enforcement collectively bargained arbitral promises. Nor is there any basis for concluding that, while *Gilmer*-compliant arbitral promises effectively vindicate the ADEA's policies, enforcing identical promises made by unions on behalf of their members would somehow be ineffective in vindicating ADEA rights.

It would be perverse, and contrary to longstanding federal labor policy, to make such distinctions. Non-unionized employees typically have little bargaining power when faced with employer-initiated arbitration clauses to shape the arbitral process, yet their arbitral promises are fully enforceable under *Gilmer* and *Circuit City*. By contrast, the participation of unions in negotiating the terms of an agreement to arbitrate should afford substantial assurance that any arbitral process agreed to would be fair, professional, even-handed, and sensitive to claims of minority groups.[18]

[18] For example, the 1.9 million member Service Employees International Union, the largest property services and health care union in the nation, as well as the parent union of Local 32BJ, estimates that fifty-six percent of its members are women and that forty percent of its members are "people of color." *See* http://www.seiu.org/about/fast%5Ffacts (last viewed Apr. 29, 2008).

*Circuit City* holds that employees can agree, as a condition of employment, to a binding waiver of a judicial forum. It follows *a fortiori* that employees acting with the benefit of union representation in the collective bargaining context should be able to authorize their collective bargaining representative to agree to such a binding waiver on their behalf. As this Court noted in comparable circumstances, an inconsistent result with regard to the enforceability of an arbitration provision "makes little sense for similar claims, based on similar facts." *Rodriguez de Quijas*, 490 U.S. at 485.

Holding such agreements unenforceable, moreover, would have no practical effect except to cut unions out of the process. If a union cannot agree to waiving a judicial forum for statutory discrimination claims, then under well-established labor law such a term of employment would become a non-mandatory subject of bargaining, and could be imposed by the employer without union participation or interference. *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485 (D.C. Cir. 1999) (if *Gardner-Denver* precludes collectively bargained for agreements to arbitrate discrimination claims, then employer may propose such clauses to each individual employee as a condition of employment). *See generally NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (distinguishing between mandatory and non-mandatory subjects of bargaining).

The anomalous result would be that a court would not enforce an arbitral promise in a collective bargaining agreement negotiated and agreed to by the union, and voted upon and ratified by the members, but would

enforce the same provision if the same employer imposed it unilaterally as a condition of continued employment for the same employees. It is hard to imagine that Congress would have intended any such outcome, and in any event, the FAA, the NLRA and the ADEA do not offer any basis for concluding that it ever did.

## II. NEITHER *GARDNER-DENVER* NOR ITS PROGENY JUSTIFIES THE REFUSAL TO ENFORCE COLLECTIVELY BARGAINED AGREEMENTS TO ARBITRATE STATUTORY DISCRIMINATION CLAIMS.

### A. *Gardner-Denver* Is Inapposite Because It Concerned Only the Preclusive Effect of an Arbitral Decision of Contractual Claims, Not the Enforceability of a Clear Agreement to Arbitrate Statutory Claims.

The Second Circuit's view that *Alexander v. Gardner-Denver* categorically renders unenforceable collectively bargained agreements to arbitrate statutory discrimination claims fundamentally misreads that decision. By its plain language, *Gardner-Denver* decided only a narrow question of law: whether an employee's submission of his contractual claim to arbitration precluded him from bringing a later lawsuit to vindicate his statutory rights under Title VII. 415 U.S. at 8, 47. Nothing in that holding bears on the question presented here — whether, notwithstanding the FAA, courts must refuse to enforce collectively bargained clear agreements to arbitrate statutory discrimination claims. The Second Circuit erred in considering itself precluded

by *Gardner-Denver* from compelling arbitration under a *Wright*-compliant promise to arbitrate.

The facts of *Gardner-Denver* make plain its inapplicability to this case. After Mr. Alexander was discharged from his job for allegedly producing too many defective parts, he filed a grievance with his union, raising contractual claims. The collective bargaining agreement between Alexander's union and his employer contained no promise to arbitrate statutory discrimination claims. 415 U.S. at 39-42. The arbitrator had no authority to resolve such claims, and sat solely as the "proctor of the bargain" without the power to invoke public laws. *Id.* at 53. After the arbitrator denied his grievance, Alexander filed suit in federal court, alleging that his discharge had violated Title VII.

This Court held, unsurprisingly, that there had been no waiver of Alexander's Title VII claims. As it noted, "mere resort to the arbitral forum to enforce contractual rights" cannot waive statutory rights if the statutory rights form no portion of the arbitration process. *Id.* at 52. Later cases explained the holding of *Gardner-Denver* in precisely this manner:

> [The *Gardner-Denver* line of cases] did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not*

> *authorized to resolve such claims, the arbitration . . . understandably was held not to preclude subsequent statutory actions.*

*Gilmer*, 500 U.S. at 35 (emphasis added).

"No holding can be broader than the facts before the court." *United States v. Stanley*, 483 U.S. 669, 680 (1987). *Gardner-Denver* held that an employee who is *not* subject to a clear contractual obligation to arbitrate statutory discrimination claims "does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII," *Wright*, 525 U.S. at 75. It held nothing about the enforceability of clear contractual agreements to arbitrate statutory discrimination claims. The *Gardner-Denver* Court was not presented with any such clear contractual agreement.

Nor do *Gardner-Denver*'s progeny expand its holding to this case. In *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981), the Court examined the Fair Labor Standards Act ("FLSA"), not the ADEA, and did *not* hold that collectively bargained agreements to arbitrate statutory claims are categorically unenforceable. The issue in *Barrentine* was not the enforceability of any such agreement, but whether a prior arbitration precluded a later FLSA action where the arbitration was conducted pursuant to an agreement that did not promise arbitration of FLSA claims and the arbitration did not in fact address or resolve the FLSA claim. *See Gilmer*, 520 U.S. at 35 (rejecting any reliance on *Barrentine* on the issue of whether promises to arbitrate are enforceable under

the FAA). To the extent that *Barrentine* repeated some of *Gardner-Denver*'s negative comments regarding arbitration, those views were conclusively rejected in *Gilmer.*

*McDonald v. West Branch*, 466 U.S. 284, 288-92 (1984), fits the same pattern as *Barrentine,* holding that an arbitration award did not have collateral estoppel or *res judicata* effect in a subsequent 42 U.S.C. § 1983 action. *See Gilmer,* 520 U.S. at 35. Again, to the extent that *McDonald* repeated *Gardner-Denver*'s comments hostile to arbitration, *Gilmer* expressly rejected them as affording no basis for refusing to enforce an arbitral promise. Neither *Barrentine* nor *McDonald* arose on a motion to compel arbitration, and neither decision discussed the FAA or implicated any of its provisions.

Accordingly, reversal of the Second Circuit's decision below would not necessitate the overruling of *Gardner-Denver* or its progeny. Here, the CBA does contain an express agreement to arbitrate statutory claims, makes compliance with the discrimination statutes a term of the agreement, and vests the arbitrators with authority to decide statutory claims. Pet. App. 43a. Moreover, unlike *Gardner-Denver*, where the arbitrator "ha[d] no general authority to invoke public laws" and could not base decisions on statutory law, *Gardner-Denver*, 415 U.S. at 53, the CBA here directs the arbitrators to "apply appropriate law in rendering decisions based upon claims of discrimination," and provides a full panoply of "appropriate remedies." CBA §30, Pet. App. 45a, 48a. *Gardner-Denver*'s holding does not bar enforcing the agreement to arbitrate in this case.

### B. None of the Policy Arguments Addressed in *Gardner-Denver* Justifies the Refusal to Enforce the Arbitration Clause.

Not only is *Gardner-Denver*'s holding inapplicable here, but none of the policy arguments it addressed supports a conclusion that – under the circumstances of this case – enforcing the arbitral promise in the CBA would be inconsistent with the ADEA.

1. *Enforcing agreements to arbitrate does not waive substantive rights.* *Gardner-Denver* expressed the concern that "there can be no prospective waiver of an employee's rights under Title VII," 415 U.S. at 51, but *Gilmer* subsequently resolved that concern, holding that while the substantive guarantees of federal anti-discrimination law are not waivable, arbitration of (and hence waiver of a judicial forum regarding) statutory discrimination claims waives no substantive rights and is fully consistent with the framework and purposes of the law. *Compare Gilmer*, 500 U.S. at 26-30 *with Gardner-Denver*, 415 U.S. at 51-52. As *Circuit City* summarized the law, "The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *See also Preston*, 128 S. Ct. at 987.

Moreover, arbitration is consistent with Congress's embrace of a variety of means of enforcing the ADEA, not limited to adjudication. As *Gilmer* noted:

> The EEOC, for example, is directed to pursue "informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, *see* 29 U.S.C. § 626(c)(1) (allowing suits to be brought "in any court of competent jurisdiction"), because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."

500 U.S. at 29 (citation omitted).

In dicta, relying solely on *Wilko v. Swan*, 346 U.S. 427 (1953), which this Court subsequently overruled in *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989), *Gardner-Denver* stated that Title VII rights "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." 415 U.S. at 51. But *Wright* subsequently confirmed that collective bargaining agreements could address more than traditional contractual issues if the

parties were clear in doing so, 525 U.S. at 79-80, and, as discussed above, *Gardner-Denver*'s holding did not reach beyond its facts, which concerned only the preclusive effects of arbitral contract-based decisions absent a clear agreement to arbitrate statutory claims and direction to arbitrators to apply statutory law. *Gilmer* specifically considered and rejected the idea that arbitration would prevent vindicating the Congressional interests underlying the ADEA or result in the waiver of non-waivable rights.

2. *Union control or sponsorship of the arbitral forum is not a basis for rejecting enforcement of a clear and unmistakable agreement to arbitrate statutory discrimination claims.* A footnote in *Gardner-Denver* expressed concern over "the union's exclusive control over the manner and extent to which an individual grievance is presented," noting that "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." 415 U.S. at 58 n.19. The decision below echoed the same concern. Pet. App. 11a-12a. But that concern is no basis for disregarding the mandatory force of the FAA, for multiple reasons.

First, and dispositively as to this case, whatever the validity of that issue in other circumstances, these facts simply do not raise it, since Respondents were *not* deprived of an arbitral forum and it is undisputed that one remains available to them. Respondents had and still have the indisputable opportunity to comply with the promise to arbitrate by bringing their statutory claims to arbitration on their own, as the Union made

clear. *See* 8, 10 & n. 3, *supra.* Notwithstanding the agreement to arbitrate and the employer's willingness to arbitrate, Respondents declined to do so. *Id.* The motion to compel was not denied because no arbitral forum was available, but even though one concededly was available.

The promise to arbitrate statutory claims in Section 30 was explicit and unqualified and made on behalf of all employees in the bargaining unit, including Respondents. The issue presented here is therefore whether collectively-bargained agreements to arbitrate statutory disputes are enforceable where plaintiffs have not shown either that an arbitral forum will be denied or that an available forum cannot effectively resolve ADEA claims in accordance with governing law. Because Respondents offered no "showing at all on the point," much less a showing of "the likelihood" that the ADEA's purposes could not be served, there was no basis for denying the motion to compel. *Green Tree Fin.*, 531 U.S. at 92.

Far from showing any likelihood that statutory rights could not be enforced, the employees here did nothing beyond pointing to *Gardner-Denver* and the Second Circuit's overreading of it – a wholly insufficient basis for departing from the FAA and not enforcing the promise to arbitrate all age discrimination claims made on the employees' behalf. *Cf. Republic Steel Corp. v. Maddox*, 379 U.S. 650, 659 (1965) (holding that employee's failure to utilize the grievance procedures provided by collective bargaining agreement precluded suit against employer for severance pay, and rejecting contention that the possibility that the grievance

procedure might be ignored or ineffective justified failure to exhaust).

Second, while this case on its facts does not involve a situation where a union's contractual power to decide whether to arbitrate a claim, or its actual decision not to do so, might mean that no arbitral forum may be available, seeking to avoid a promise to arbitrate on the basis of the "risk" that arbitration may not happen or may not effectively vindicate ADEA rights runs afoul of the rule that a party seeking to avoid an arbitral promise cannot succeed by pointing to a "risk" that the arbitration will not adequately vindicate statutory rights.

> To invalidate the agreement on that basis [*i.e.*, on the basis of what *might* happen] would undermine the "liberal federal policy favoring arbitration agreements." It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.

*Green Tree Fin.*, 531 U.S. at 91 (quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 24). Pointing to a "risk" of what might happen "is too speculative to justify the invalidation of an arbitration agreement." *Id.*

Third, concern over union sponsorship and control proves too much. It is possible that the interests of the union may conflict with individual interests in some cases, but employees, acting through their lawfully designated unions, are nonetheless free to waive

collective and individual rights, in part because multiple structural protections safeguard individual claims from collective harm.

The duty of fair representation protects the employees, and there is no reason to suppose it less adequate here than in other circumstances.[19] Because labor unions are themselves subject to the ADEA and other anti-discrimination statutes, a union's decision not to pursue a workers' employment discrimination claim, if motivated by discriminatory animus, could subject the union to liability.[20] In those cases where a union member

[19] An employee who believes the union acted unfairly (in not processing or improperly handling a discrimination claim) can bring a duty of fair representation claim against it. *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1988); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Respondents brought such a claim here, but then withdrew it with prejudice. Furthermore, if a union should fail in its duty to fairly represent its members, the employees may bring an action for breach of the collective bargaining agreement. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983). Such an action against the union and employer could provide the employees with complete relief for statutory claims where, as here, the collective bargaining agreement incorporates rights under applicable employment discrimination laws. *See, e.g., Seymour v Olin Corp.*, 666 F.2d 202, 211 (5th Cir. 1982) (in "hybrid" Section 301/duty of fair representation action, the court has the power to award the remedies available in an arbitration held pursuant to the contract's grievance-arbitration procedure – *i.e.*, reinstatement and backpay in case of alleged wrongful termination – as well as prospective equitable relief).

[20] *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (affirming liability for union's discriminatory refusal to

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may wish to challenge the fairness of the arbitration process, courts are empowered to determine whether the process was in fact fair, and whether the decision was rendered by a neutral unbiased adjudicator. *See Gilmer*, 500 U.S. at 30-31; *see also, e.g., Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002). And an agreement to arbitrate statutory discrimination claims by an employee does not waive the employee's right to file charges with the Equal Employment Opportunity Commission (EEOC) or parallel state or local agencies, or prohibit such agencies from commencing a lawsuit in response to the charge seeking individual relief for the employee. *See EEOC v. Waffle House*, 534 U.S. 279 (2002).[21]

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file grievable racial discrimination claims); *EEOC v. Shopmen's Local 832*, 112 F.3d 503, reported in full at 1997 U.S. App. LEXIS 9570 (2d Cir. Apr. 29, 1997) (award of over $100,000 to employee whose union would not pursue her discrimination claim); *Woods v. Graphic Commc'ns*, 925 F.2d 1195 (9th Cir. 1991) (union liable for violation of state anti-discrimination law and breach of duty of fair representation for failure to process plaintiff's grievances concerning racial harassment); *Farmer v. ARA Servs., Inc.*, 660 F.2d 1096 (6th Cir. 1981) (affirming union liability and award of backpay and compensatory damages, under Title VII and for breach of duty of fair representation, based upon, inter alia, the union's refusal to arbitrate plaintiff's claims).

[21] Similarly, the General Counsel of the National Labor Relations Board takes the position that an agreement to arbitrate statutory claims does not waive the right to file charges with the NLRB or prohibit the NLRB from initiating its own action. *See, e.g., In re Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92 (Aug. 21, 1995).

Fourth, the concern over conflict rests on outmoded assumptions that the interests of the majority will generally oppose potentially meritorious discrimination claims. That is not the reality of today's integrated workforce and diverse unions. *See n.* 18 *supra*. If anything, unions have an interest in ensuring that claims of discrimination are grieved and arbitrated to enhance their prestige with members and strengthen their stature as collective bargaining representatives. *See Republic Steel Corp.*, 379 U.S. at 653. Indeed, both the EEOC and courts recognize the right of unions to assert employment discrimination claims on behalf of their members. *See* EEOC Compliance Manual, Section 2-V (b), *available at* http://www.eeoc.gov/policy/ docs/ threshold.html (providing that a union "may file a charge on behalf of one of its constituents"); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (affirming right of union to bring Title VII claim on behalf of its members), *cert. denied*, 512 U.S. 1228 (1994).

3. *Promises to arbitrate statutory claims in a collective bargaining agreement are no less voluntary than the arbitral promises enforceable under Gilmer.* A final concern mentioned in *Gardner-Denver* was that unionized employees cannot be said to have voluntarily waived a federal judicial forum when the arbitral promise is delivered by the union acting on the members' behalf. 415 U.S. at 58 n. 19. These concerns are, however, met by *Gilmer* and *Circuit City,* as well as by the union's role as exclusive bargaining representative under the NLRA. Further, arbitral provisions in union contracts are likely to be no less consistent with effective vindication of statutory anti-discrimination laws than *Gilmer*-compliant promises, because unionized

employees, through their elected representatives, have an opportunity to consent (or not) to a promise to arbitrate statutory discrimination claims, and to shape the arbitral forum and rules.[22] The individual union members have at least the same ability that non-union employees have to reject or consent to arbitration clauses, and a greater ability to shape them.

* * *

The question presented here concerns not claim preclusion, as in *Gardner-Denver*, but a motion to compel arbitration under the FAA pursuant to a clear and unmistakable promise that all statutory workplace discrimination claims would be subject solely and exclusively to arbitration. *Gardner-Denver* does not preclude compliance with the FAA according to its terms. *Gilmer*, *Wright* and *Metropolitan Edison*, read together, teach that promises to arbitrate such claims are generally enforceable, and offer no basis for distinguishing collectively bargained promises to arbitrate statutory discrimination claims from *Gilmer*-enforceable promises, so long as the promises are clear and unmistakable and not inconsistent with the purpose or intent of the legislation, as they are here.

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[22] *See, e.g.,* Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* (2d ed., 2004), at 507 ("Congress intended [in the National Labor Relations Act] to substitute the strength of the collectivity for the weakness of the individual bargainer").

## CONCLUSION

For all the foregoing reasons, the judgment below should be reversed, and the case remanded for entry of an order compelling arbitration.

Respectfully submitted,

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